IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 155 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIKRAM HIRALAL SHAH - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR SV RAJU for Applicant(s) : 1,
MS MEETA PANCHAL APP for Respondent(s) : 1,
MR SAURABH MEHTA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 19/07/2007

ORAL JUDGMENT

1. The applicant has preferred this application u/s 397 read with Section 401 of

the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr. P. C.”) challenging the order passed by the learned Metropolitan Magistrate, Court No. 2, Ahmedabad on 12-2-1998 below application Exh. 2 in Criminal Case No.2627 of 1994 rejecting the application moved by the applicant for discharge u/s 239 of the Cr. P.C.

2. The brief facts of the prosecution case are that Rajesh Shivkumar Mishra, General Manager, Ahmedabad Advance Mills Ltd., lodged complaint before Madhupura Police Station, Ahmedabad on 19-6-1994 against their agent Vikram Kumar & Co. for the offences punishable u/s 379, 465 and 471 of the I.P. Code alleging that in all31 bales of cotton were sold by the Mill to one Lalit Taxtile of Bombay through their agent and the goods were sent to Bombay on 31-1-1994 though New India Transport but as payment was not received by the Mill till 25-3-1994, he gave a letter to the transport Company on 28-3-1994 to return the goods lying at transport company's godown at Bombay, however the transport company demanded original Builty and therefore original

“Builty” with a letter was given to the transport company on 1-4-1994 after obtaining their signature on the copy of the letter and kept it in the file; that on 6-6-1994 carting agent of Mill (Marfatiya) Shankarbhai went to the transport company with a letter of the Mill to take delivery of the goods but the transport Company demanded demurage and other charges from him and so the agent returned without taking delivery of the goods; that on 10-6-1994 the agent again went to the transport company with the amount of charges demanded by them but the transporter demanded copy of the letter signed by them, therefore the agent returned and informed Homi Doctor of the Mill about the letter, that on making search for the letter it was not found in the file of the Mill; that when on 17-6-1994 Homi Doctor inquired from the transport company about delivery of the goods, he was informed that Vikram Kumar & Co. had taken away delivery of the goods, and learnt that Vikram Kumar & Co. had taken delivery of the goods on the basis of forged documents like delivery memo, and forged delivery letter. Therefore, complaint came to be lodged. On the basis of the complaint

offence came to be registered as I – CR No.190 of 1994 and investigation started. On completion of the investigation charge sheet was laid before learned Metropolitan Magistrate, Court No. 2, Ahmedabad.

3. The applicant - accused moved application Exh. 2 for discharge contending therein that he was Del Credere Agent of Mill and the Mill agreed to sell the goods to one Lalit Textiles through him and accordingly the goods were sent to Lalit Textiles; that said Lalit Textiles did not accept delivery of the goods and therefore, he informed Sales-man of Mill about the same; that the Sales-man gave a letter to re-book the goods to Ahmedabad and accordingly the goods were re-booked; that the Mill did not take delivery of the goods and it remained with the transporter for long time. It is further alleged in the application that the applicant is entitled for commission as Del Credere Agent and the Mill had orally informed that he should take delivery of the goods lying with the transporter as per custom of the business; that the applicant also requested the Mill to permit him to take delivery of the goods. It

is further alleged that civil suit was filed by him to recover the outstanding amount of commission from the Mill and the suit is still pending. Therefore, with a view to raise a defence in the suit complaint is filed with malafide intention; that Mill has not produced any documents and there is no wrongful loss to the Mill and no wrongful gain to the applicant; that no opinion of the Hand-writing Expert has been obtained which is essential in this case and therefore no offence is made out against the applicant. Hence, the applicant is required to be discharged.

4. After hearing the learned counsels for the parties, learned Metropolitan Magistrate rejected the said application. Being aggrieved and dissatisfied with the said order, the applicant has preferred this Revision Application.

5. Heard learned advocate Mr. S.V. Raju for the applicant, learned advocate Mr. Saurabh Mehta for the original complainant and learned A.P.P. Ms. Meeta Panchal for the State at length and in great detail.

6. Learned advocate Mr. Raju for the applicant submitted that there is no evidence to indicate that the applicant has committed forgery or document was signed by the applicant and no opinion of the Hand-writing Expert has been obtained. He also submitted that there is no evidence to indicate that there was theft or forgery of any document. The applicant was entitled for commission and as an agent ownership of the goods passed to him on sale, hence it cannot be said that the offence was committed by the applicant. Therefore, the learned Metropolitan Magistrate committed error in rejecting the application and hence the order is required to be set aside. In support of his arguments he has relied on numerous decisions of the Apex Court.

7. Learned advocate Mr. Saurabh Mehta for the opponent No.2 supported the impugned order and submitted that statement of the witnesses clearly indicate that the applicant was involved in the offence and at this stage the Court is not required to evaluate the evidence minutely. Therefore, the learned

Metropolitan Magistrate was justified in rejecting the application filed by the applicant.

8. Learned A.P.P. Ms. Panchal for the State supported the impugned order and submitted that it is not the case where there is no evidence. On the contrary, the evidence clearly indicates involvement of the applicant in the offence and at the stage of framing of the charge the Court is not required to weigh the evidence. She also submitted that the question of non-obtaining opinion of Hand-writing's Expert is a matter of evidence and the court is not required to go into the minute details of evidence at the stage of framing of charge. Therefore, the learned Metropolitan Magistrate was justified in rejecting the application. In support of her arguments, she has relied on the some decisions of the Apex Court.

9. It is not in dispute that the applicant was an agent of the Mill for sale of cloth and an agreement was executed between the applicant and the Mill, in that regard. The Mill sold cotton bales to one Lalit Textiles

and sent it through transport. The original invoice , receipt and other necessary documents to take delivery of the goods were sent through Bank to the purchaser. However, the purchaser did not retire (relieve) the documents and thereby did not accept delivery of the goods. Therefore, Bank returned the original documents to the Mill and the goods sent by the Mill remained at the godown of the transport Company at Bombay. It appears that the goods were re-booked and sent back to Ahmedabad and were kept at the godown of the transport Company. Thereafter, Carting Agent (Marfatiya) of the Mill received letter from the Mill to take the goods back from the godown of the transport Company. Therefore Carting Agent (Marfatiya) went to the office of the transport Company to take delivery of the goods but the transport Company insisted for payment of freight charges, octroi and demurrage charges. Therefore the Carting Agent (Marfatiya) returned without taking delivery of the goods. Thereafter, the Carting Agent (Marfatiya) again went to the transport Company to make payment and take the delivery of the goods. However, he was informed that

the applicant already took away delivery of the goods. Therefore, Mill was informed about the same and on inquiry by the Mill it was found from the record of the transport Company that the applicant had taken delivery of the goods on the basis of documents. According to the complainant the documents on the basis of which delivery was taken from the transport company were stolen from the record of the Mill and were forged.

10. The Investigating Agency recorded statement of Homi Doctor, the Sales Officer of the Milland Parasram Bholaram, a partner of New India Transport.

11. It appears from the statement of witness Homi Pestonji Doctor that receipt of original Builty given by the transport company , and carbon copy of memo given to the transport Company to give delivery of the goods, were found stolen. The statement also indicates that the transport company also showed a letter with illegible signature addressed to it to give delivery of the goods to Vikram Kumar & Co. According to the witness these

documents were stolen from the record of Mill and were forged. This prima-facie indicates that the applicant obtained delivery of the goods on the basis of the documents which were allegedly stolen from the record of the Mill and were forged.

12. The statement of Parashram Bholaram of transport Company indicates that the Mill asked the transport Company to call back the goods from Bombay and a writing to that effect was given to the transport company. Therefore, they demanded consignee copy with letter to return the goods. The Mill gave these documents to the transport company. These documents were given by a person from Vikram Kumar & Co. and he had taken the copy with signature and stamp of transport company after passing receipt thereof. Thereafter, the goods were sent back to Ahmedabad and Homi Doctor of the Mill was informed to take delivery of the goods but the Mill did not take delivery for some time. Meanwhile one person of Vikram Kumar and Co. came with a letter of the Mill to give delivery of the goods with signature of the transport company and other documents but it did not bear stamp

of Mill. However, the delivery of the goods was given to such person and when Homi Doctor asked him as to why did he given delivery of the goods, he informed him that the delivery was given to the person as he came with a writing of the Mill on its letter head and showed the writing, thereupon Homi Doctor informed him that the documents were stolen from Mill. The witness also produced the copies of the documents given by Vikram Kumar & Co. to take delivery of goods.

13. In view of above statements, prima facie it emerges that the applicant received delivery of the goods on the basis of the documents which were stolen from the Mill and were forged. Therefore, this evidence involves the applicant in the offence.

14. As regards the contention that the applicant became the owner of the goods on sale to Lalit Textiles and hence entitled to take delivery of the goods, in my view, sale was not complete and therefore the applicant had no right to take delivery of the goods. Therefore, this contention cannot be accepted.

15. It is also significant that the applicant has in his application stated that the Mill had orally informed him to take delivery of the goods. But the manner in which delivery was taken, it is difficult to believe that the applicant was asked to take delivery. The evidence clearly indicates that the documents were taken out of possession of the Mill without its consent and the false documents were made to obtain delivery of the goods and such documents were used as genuine for taking delivery of the goods from transport Company knowing that the documents were forged. Therefore, in my view, there is grave suspicion to form an opinion as to the existence of ingredients constituting the offence alleged against the applicant.

16. In the decision of **State of Bihar V. Ramesh Sigh, reported in AIR 1977 Supreme Court 2018,** the Supreme Court held as under :

> ***"Reading Ss. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not***

> ***to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if approved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under S. 227 or S. 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction."***

17. In view of above settled principles, at the stage of framing of the charge, the Court is not required to weigh the evidence. Therefore, Simply because no Hand-writing Expert's opinion has been obtained, it cannot be said that there is no case against the applicant. It is a matter of evidence and the Court is not required to minutely scrutinise the evidence at the time of framing of the charge. Therefore, the submission of the learned advocate for the applicant cannot be accepted. Considering the evidence collected by the Investigating Agency, the learned Metropolitan Magistrate was justified in

rejecting the application for discharge.

18. In the decision of **Dilawar Babu Kurane V. State of Maharashtra, reported in AIR 2002 Supreme Court 564 : (2002) 2 SCC 135,** the Hon'ble Apex Court observed that the Judge cannot act as a post office but has to consider total effect of evidence and documents produced before the Court while framing of charge. In this case, the learned Magistrate has considered the evidence of the witnesses and after considering the total effect of the evidence, has rejected the application for discharge.

19. The learned advocate for the applicant has relied upon following decisions :

A. Century Spinning and Manufacturing Co. Ltd. and others V. State of Maharashtra,reported (1972)3 SCC 282;

B. Supdt. & Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and others, reported in Air 1980 SC 52;

C. Gopal Chauhan V. Smt.Satya and another

reported in1979 Cr. Law Journal 448;

D. Dilawar Balu Kurane V. State of Maharashtra (2002) 2 SCC 135

E. Union of India V. Prafulla Kumar Samal and another (1979) 3 SCC 4.

F. Dilawar Balu Kurane V. State of Maharashtra AIR 2002 SC 564

G. Keshub Mahindra V. State of M.P. (1996) 6 SCC 129

20. All these decisions lay down principle that the Court has to sift and weigh the evidence for the limited purpose of finding out whether a prima facie case is made out and where two views are equally possible and when evidence gives rise to some suspicion but not grave suspicion the Court can discharge the accused. In the present case the material collected by the Investigating Agency indicates grave suspicion against the applicant and it has not been properly explained. Therefore, the learned trial Judge was justified in rejecting the application for discharge.

21. Learned advocate for the applicant also relied upon following decisions in support of his case that there is no material to indicate that the applicant has committed offence of theft and forgery

(i) Dr. Vimla V. The Delhi Administration, reported in AIR 1963 Supreme Court 1572,

(ii) Chandu Kumar Das Karmarkar and An Other V. Abanidhar Roy, reported in AIR 1965, Supreme Court 585;

(iii) Ramratan and others V. The State of Bihar and another, AIR 1965 Supreme Court, 926,

(iv) Suvvari Sanyasi Apparao and another V. Boddepalli Lakshminarayana and another, reported in AIR 1962 Supreme Court 586,

(v) Punjab National Bank and Others V. Surendra Prasad Sinha, reported in 1993 Supp (1) Supreme Court Cases 499,

(vii)Ram Ekbal Rai and Others V. Jaldhari Pandey, reported in (1972) 3 Supreme Court cases 841,

22. All above cited decisions are in respect of offence punishable u/s 379, 380, 405, 409 of the I.P. Code. In the present case, the evidence at the stage of framing charge is sufficient to form an opinion about existence of ingredients constituting the offence alleged against the applicant and therefore in the facts of this case these decisions cannot be made applicable.

23. For the foregoing reasons, in my opinion, the learned Metropolitan Magistrate has not committed any jurisdictional error in rejecting the application for discharge. Therefore, this application deserves to be dismissed and no interference is warranted in the impugned order of the learned Metropolitan Magistrate. Accordingly, this Revision Application fails and stands dismissed. Rule stands discharged.

24. Learned advocate for applicant submitted that the applicant intends to approach the

higher forum and hence some reasonable time may be granted for that purpose and interim relief granted earlier by this Court may kindly be extended for a period of eight weeks.

25. In the facts and circumstances of the case, the request made by the learned advocate for the applicant is acceded to and interim relief granted earlier by this Court is extended for a further period of six weeks.

(Bankim N. Mehta, J.)

/JVSatwara/